bands with which certain savage races in Australia are wont to bind their childrens' heads, instruments to arrest legal development, rather than to simplify it. "We do not inquire," says M. Ballot Beaupré, former President of the Court of Cassation, in speaking of the method of the French courts in reading their Civil Code,—"We do not inquire what the legislator willed a century ago, but what he would have willed if he had known what our present conditions would be."[10] Without going quite so far as the learned French jurist, is there any good reason why our courts in interpreting the California Civil Code should not do so in the light of the common law, viewing the common law itself not solely as the "previous" common law, but as a constantly developing body of principles which meets the actually existing conditions of life?

O. K. M.

PROCESS: SERVING FOREIGN CORPORATION BY SERVING STATE OFFICER.—The California statute[1] providing that process on a foreign corporation may be served on the Secretary of State if the corporation fails to designate an agent for service, is unconstitutional, according to the decision of the Federal Court for the Southern District of California in the case of *Knapp v. Bullock Tractor Company.*[2] The court, recognizing that the Secretary of State is not required to inform the corporation of the service[3] and that it would probably be ignorant of the litigation, holds that the statute fails to guarantee reasonable notice and is therefore a denial of due process of law. Although this decision harmonizes with several cases in which similar statutes in other states have been held invalid,[4] it is admittedly in conflict

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[10] Quoted by Munroe Smith, Jurisprudence, p. 30.

[1] Cal. Civ. Code, § 405, repealed by Cal. Stats. 1917, p. 381 and re-enacted as par. 3, sec. 2 of Foreign Corporations Act, Cal. Stats. 1917, p. 371. The same principle would obviously apply to the similar provision with regard to foreign partnerships, found in Cal. Civ. Code, § 2472. A different principle might apply, however, to the provision of the Corporate Securities Act, Cal. Stats. 1917, p. 673, requiring foreign corporations desiring to issue securities to appoint the Secretary of State their agent to receive process. See dictum contra, Knapp v. Bullock Tractor Co. (1917), 242 Fed. 543, at p. 552. Under this provision, it might be held that the Secretary would be bound to notify the corporation, Sparks v. National Masonic Ass'n (1896), 100 Iowa 458, 69 N. W. 678 and service would be sufficient Paulus v. Hart-Parr Co. (1908), 136 Wis. 601, 118 N. W. 248; Mutual Reserve Ass'n v. Tuchfeld (1908), 159 Fed. 833, even if the corporation failed to make such an appointment. Ehrman v. Teutonia Ins. Co. (1880), 1 Fed. 471; note 59 L. Ed. 987.

[2] (May 19, 1917), 242 Fed. 543.

[3] Holiness Church v. Metropolitan Church (1910), 12 Cal. App. 445, 107 Pac. 633.

[4] King Tonopah Mining Co. v. Lynch (1916), 232 Fed. 485; Southern Ry. Co. v. Simon (1910), 184 Fed. 959; Souner v. Missouri Valley Bridge

with a decision of the Supreme Court of California upholding the statute in question,[5] and is also in conflict with several cases, not cited by the court, upholding similar statutes in other states.[6]

Courts upholding these statutes declare that a state, since it may exclude a foreign corporation altogether, may require its assent to service upon a state officer as a condition to its entry into the state for the purpose of transacting business, and that the assent to such service may be implied from the corporation's coming into the state with notice of the statute. Courts reaching the contrary conclusion do not overlook this argument, but deny its validity. Their contentions, though often not clearly stated, seem to be (1) that the state cannot require the corporation to waive its right to due process of law; and (2) that such assent, even if it can be required, cannot be implied merely from the entry of the corporation. Both contentions merit consideration.

First, cannot such assent be required? While it has often been said that the power to exclude foreign corporations will not justify a requirement that constitutional rights be waived,[7] it has also been declared that the state may require the corporation to assent to any condition which it deems expedient, and that "no individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the state may require for the grant of its privileges".[8] In the cases involving statutes similar to that of California, the fullest discussion of this point is found in King Tonopah Mining Co. v. Lynch,[9] and much reliance is placed on the decisions holding that a state cannot require a foreign corporation to waive its right to remove cases to the Federal courts.[10] These decisions,

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Co. (1909), 123 La. 964, 49 So. 657; Pinney v. Providence Loan Co. (1900), 106 Wis. 396, 82 N. W. 308, 50 L. R. A. 577, 80 Am. St. Rep. 41. On appeal of Southern Ry. Co. v. Simon, the decision was affirmed but on other grounds, both the District Court of Appeal (1912), in 195 Fed. 56, at p. 59, and the Supreme Court (1914), in 236 U. S. 115, 129, 59 L. Ed. 492, 35 Sup. Ct. Rep. 255, expressly declining to pass on the constitutionality of the statutory provision.

[5] Olender v. Crystalline Mining Co. (1906), 149 Cal. 482, 86 Pac. 1082.

[6] Vulcan Construction Co. v. Harrison (1910), 95 Ark. 588, 130 S. W. 583; Old Wayne Ass'n v. McDonough (1905), 164 Ind. 321, 73 N. E. 703; Fisher v. Traders' Ins. Co. (1904), 136 N. C. 217, 48 S. E. 667; Youmans v. Minn. Title Ins. Co. (1895), 67 Fed. 282; Wilson v. Martin-Wilson Co. (1889), 149 Mass. 24, 20 N. E. 318.

[7] **Blake v. McClung (1898), 172 U. S. 239, 43 L. Ed. 432, 19 Sup. Ct.** Rep. 165; Hooper v. California (1895), 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. Rep. 207; Southern Pacific Co. v. Denton (1892), 146 U. S. 202, 207, 36 L. Ed. 942, 13 Sup. Ct. Rep. 44; St. Clair v. Cox (1882), 106 U. S. 350, 27 L. Ed. 222, 1 Sup. Ct. Rep. 354

[8] Field, J., speaking for the court in Horn Mining Co. v. New York (1891), 143 U. S. 305, 36 L. Ed. 164, 12 Sup. Ct. Rep. 403; quoted by White, J., in concurring opinion in Pullman Co. v. Kansas (1909), 216 U. S. 56, 66, 54 L. Ed. 378, 30 Sup. Ct. Rep. 232.

[9] Supra, n. 4.

[10] Southern Pacific v. Denton supra, n. 7.

however, may be rested on the theory that the parties may not alter the jurisdiction of the courts. It is submitted that there is an essential difference between the waiver of process and the waiver of jurisdiction.[11] The former involves only the rights of the parties; the latter involves the framework of the judiciary. It is well settled that the parties may waive lack of process by a general appearance,[12] but that they cannot waive a court's lack of jurisdiction.[13] Altogether, it can scarcely be regarded as settled that the state cannot require a foreign corporation to assent to a waiver of due process to the extent demanded by the California statute.

Second, if such assent can be required, cannot it be implied from the act of the corporation in entering the state with notice of the statute? Courts answering in the negative assert that the corporation cannot be presumed to have notice of an illegal statute.[14] It is submitted that this rule, even if its validity be granted, is either inapplicable or immaterial, depending on whether an assent to waiver of due process may or may not be required. If the assent may be required, the rule is inapplicable, for the statute is, *ex hypothesi,* not illegal. If the assent may not be required, the rule is immaterial, for the assent, even if expressly given, would be of no effect.[15]

Until the Supreme Court of the United States passes squarely on these statutes, their validity must remain open to question and the process therein provided will not be used by cautious attorneys. A simple legislative solution would be an amendment providing that the Secretary of State shall immediately, and by registered mail, notify the corporation of service at its last address on file with him. In that case, service on the Secretary of State would clearly be sufficient.[16]

P. L. F.

STATUTE OF LIMITATIONS: REMOVAL OF BAR BY PAYMENT OF INTEREST.—The English courts in interpreting Lord Tenterden's Act[1] have determined that it is not necessary that a payment of part of the principal of a debt barred by the Statute of Limitations, or of interest thereon, be evidenced by a writing

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[11] See Ex parte Schollenberger (1877), 96 U. S. 369, 24 L. Ed. 853.

[12] Cal. Code Civ. Proc., § 416; Security Loan Co. v. Boston Fruit Co. (1899), 126 Cal. 418, 58 Pac. 941.

[13] King v. Kutner-Goldstein Co. (1901), 135 Cal. 65, 67 Pac. 10.

[14] King Tonopah Mining Co. v. Lynch (1916), 232 Fed. 485, at p. 491.

[15] Insurance Co. v. Morse (1874), 20 Wall. 445, 22 L. Ed. 365.

[16] Mutual Reserve Ass'n v. Phelps (1903), 190 U. S. 147, 47 L. Ed. 987, 23 Sup. Ct. Rep. 707. See also St. Mary's Petroleum Co. v. West Virginia (1906), 203 U. S. 183, 51 L. Ed. 144, 27 Sup. Ct. Rep. 132, denying writ of error to same case (1905), 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951.

[1] 9 Geo. IV c. 14.